IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

GEORGE DUNBAR PREWITT — PLAINTIFF

vs. — Civil Action No. 4:95cv311-D-O

GOVERNOR KIRK FORDICE
and NEAL BIGGERS, JR. — DEFENDANTS

MEMORANDUM OPINION AND ORDER
DIRECTING SUBMISSION OF BRIEFS

This court comes now, *sua sponte*, to consider the plaintiff's claims in this cause. Finding that there are significant questions regarding the ability of the plaintiff to maintain this action, all parties shall be ordered to submit briefs on the matters discussed in this memorandum opinion.

FACTUAL SUMMARY

On December 14, 1992 the plaintiff George Dunbar Prewitt filed an action in this court to challenge the validity of two Mississippi statutes which provide for the appointment of certain public officials to vacant offices until new elections are held to fill those offices. Miss. Code Ann. §§ 9-1-103, 105. In particular, Mr. Prewitt argued that in order to have legal effect, those statutes should have been submitted to the United States Department of Justice for preclearance under the Voting Rights Act of 1965, 42 U.S.C. § 1973c. A three-judge panel, consisting of United States District Judge Neal Biggers, Jr., United States Circuit Judge E. Grady Jolly and the undersigned United States District Judge, was formed to hear the plaintiff's claim under Section 5 of the Voting Rights Act. The plaintiff's Section 2

claim remained before the undersigned alone. Upon motions to dismiss by the defendants, the three-judge panel as well as the undersigned dismissed all of the plaintiff's claims. Prewitt v. Moore, 840 F. Supp. 428, 436 (N.D. Miss. 1993) (Prewitt I); Prewitt v. Moore, 840 F. Supp. 436, 440 (N.D. Miss. 1993) (Prewitt II). Mr. Prewitt moved this court to reconsider its ruling in Prewitt II, and the court denied reconsideration by order dated January 21, 1994, and the plaintiff did not appeal. Mr. Prewitt also sought to appeal the decision of the three-judge panel directly to the United States Supreme Court, which denied the plaintiff relief.

On September 29, 1995, almost two years since the conclusion of the original action, Mr. Prewitt filed the action at bar. In his complaint, he seeks relief identical to that sought before the three-judge panel in the prior action. As a basis for relief, Mr. Prewitt states that a member of the panel, District Judge Neal Biggers, Jr., was biased in favor of a ruling adverse to the plaintiff and should not have served on the panel.

DISCUSSION

At the time of the court's decisions in the plaintiff's prior action, Mr. Prewitt had available to him an organized appeals process if he was unhappy with the decisions of this court. He attempted unsuccessfully to appeal to the United States Supreme Court the decision of the three-judge panel on his claim under Section 5 of the Voting Rights Act and seeks now to challenge it again. As it should certainly be, this court is concerned with the application of the doctrine of *res judicata* to the action at bar.

The plaintiff's claimed avenue for relief is the "independent action" for relief from judgment as mentioned in Federal Rule of Civil Procedure 60(b). The rule states in part:

> This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding . . . . Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill in review, are abolished, and the procedure for obtaining any relief from judgment shall be by motion as proscribed in these rules or by an independent action.

Fed. R. Civ. P. 60(b). Rule 60(b) does not create this "independent action," but rather preserves the right of a party to bring such an action for equitable reform of a judgment. In re West Texas Mktg. Corp., 12 F.3d 497, 503 n.3 (5th Cir. 1994). The elements for such an action are:

> 1) a judgment which ought not, in equity and good conscience, to be enforced;
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> 2) a good defense to the alleged cause of action on which the judgment is founded;
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> 3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of the defense;
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> 4) the absence of fault or negligence on the part of the defendant; and
>
> 5) the absence of any adequate remedy at law.

West Texas Mktg., 12 F.3d at 503 n.3; Addington v. Farmer's Elevator Mut. Ins. Co., 650 F.2d 663, 668 (5th Cir. 1981); Bankers Mortgage Co. v. United States, 423 F.2d 73, 79 (5th Cir. 1970). It is the plaintiff in the original action, and not the defendant, who challenges the final order in this case. As such, the factors should be adjusted accordingly in their application. The court

notes that the plaintiff waited almost two years before filing his independent action to challenge the judgment, but delay in filing does not necessarily bar an independent action in equity. West Texas Mktg., 12 F.3d at 503 n.3; see Robinson v. Volkswagenwerk AG, 56 F.3d 1268, 1274 (10th Cir. 1995) ("Where the independent action is resorted to, the limitations of time are those of laches or statutes of limitations."). Further, an independent action cannot be used as a basis for "the relitigation of issues adjudicated by the judgment sought to be annulled." Carter v. Dolce, 741 F.2d 758, 760 (5th Cir. 1984); Addington, 650 F.2d at 668.

Aside from the question of whether the plaintiff's claim of Judge Biggers' bias entitles him to relief, this court is concerned that the plaintiff is not able to meet the requisite requirements to maintain an independent action for equitable relief from judgment. See Addington, 650 F.2d at 668 ("[The party's] charge of bias on the part of the federal judge could have been remedied on appeal."). It seems that the more proper manner for resolution of this issue would have been to raise it before the three-judge panel, and then on direct appeal if the matter was not resolved to the plaintiff's satisfaction. In this court's opinion, the failure to do so could easily constitute "fault" of a party as contemplated in the fourth requirement to maintain an independent action. In any event, the parties should be heard on this issue so that the court may make a fully informed decision.

THEREFORE, it is hereby ORDERED THAT:

1) the plaintiff shall, within twenty (20) days of the date

of this order, submit a brief to the court on his ability to maintain this action. The defendants shall submit responses and briefs within ten (10) days of the plaintiff's submission. The plaintiff shall then file a rebuttal and brief within five (5) days of the defendants' submission of responses. While the briefs of the parties are to concentrate upon the plaintiff's ability to maintain this action, additional relevant matters may be discussed. Copies of any submissions to the court are to be provided to the opposing parties.

SO ORDERED, this the _____ day of October, 1995.

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United States District Judge